

# Is the Privilege of Private Discrimination an Artifact of an Icon?

DONALD A. DRIPPS\*

Professor Zwolinski poses a thoughtful challenge to the law's distinct responses to private and commercial discrimination along the lines of race, gender, religion, sexual orientation, disability, age, and so on.<sup>1</sup> He considers three plausible explanations for the privileged status of private discrimination: (1) private discrimination is harder to detect; (2) private discrimination is less harmful; and (3) private discrimination is morally authorized by personal autonomy.<sup>2</sup> Carefully analyzing each candidate, he rejects them all, concluding that the legal treatment of private and commercial discrimination ought to be more closely aligned.<sup>3</sup> He remains noncommittal on whether the right to discriminate in employment and housing ought to be broadened, or whether the right to discriminate in choosing friends, roommates, club members, dates, and so on ought to be narrowed.

Most of what Professor Zwolinski says about the three plausible grounds for private discrimination's privileged position seems to me persuasive. I do, however, offer three observations about the prospects of justifying the prevailing distinction. First, as a methodological matter, there are many settled rules and institutions that are, from the standpoint of moral theory, not quite justified by any single normative theory. They may, however, be justified pragmatically, when they are

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\* Professor, University of San Diego School of Law; B.A. 1980, Northwestern University; J.D. 1983, University of Michigan.

1. Matt Zwolinski, *Why Not Regulate Private Discrimination?*, 43 SAN DIEGO L. REV. 1043 (2006).

2. Zwolinski, *supra* note 1, at 1044.

3. *Id.* at 1044-45.

*nearly* justified by *several* reasons. The imperfect fit between the rule or practice and morally justified outcomes in all the cases covered by the rule or practice may then be of less concern, especially if the cost of more discriminating alternative rules or practices is likely to be high.

Second, an attempt to redistribute the goods now distributed by persons exercising the privilege of private discrimination is normatively problematic. Those currently receiving these goods are usually innocent, so the loss to the victim of discrimination is a gain to another, unmerited in some sense, but still a gain. And it may well be impossible to transfer that same good to someone else who, in some sense, merits it. The government can force *A* to admit *B* to *A*'s golf club, but it cannot make *A* *like* or *respect B*.

Third, the privilege for private discrimination indeed tends to track a widely-felt sense that autonomy has special value in some spheres of human life. Throughout the developed world, freedom of speech, freedom of religion, and sexual privacy enjoy more respect, legally and socially, than the right to contract, to own weapons, or to consume intoxicants. This hierarchy of liberties may turn out to be arbitrary, but it prevails so widely that I would be slow to assume that it is. The privileged liberties turn out to protect the same zones of life that enjoy the privilege of private discrimination.

## I.

Suppose we reconsider the legal regulation of discrimination as a choice between a rule and a standard. The rule provides: "Discrimination based on familiar identity markers in commercial transaction is prohibited. Discrimination based on familiar identity markers in noncommercial, private transactions is permitted." The standard provides: "Wrongful discrimination based on familiar identity markers is prohibited, in both the commercial and the private context."

The standard is *fully* or *completely* justified in the sense that, when properly applied, it will always produce the right result. Yet it is a familiar lesson of legal theory that rules are sometimes preferable to standards.<sup>4</sup> The case for rules is strongest when the system expects to adjudicate a large number of cases, when regulated actors have a legitimate need for clear and prospective guidance on the law's demands, when the available remedies for violations discovered *ex post* are costly or imperfect, and

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4. See generally FREDERICK SCHAUER, *PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISIONMAKING IN LAW AND IN LIFE* (1991); Colin S. Diver, *The Optimal Precision of Administrative Rules*, 93 YALE L.J. 65 (1983); Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557 (1992).

when it is difficult to make accurate assessments of the specific facts that would inform the application of a standard to particular cases.

Professor Zwolinski is right when he says that the law regulates *some* aspects of private life, like drug use, that *some* private discrimination is open and notorious, and that *some* commercial discrimination is hard to prove.<sup>5</sup> I am willing to assume that *some* private discrimination has more baleful consequences than *some* commercial discrimination.<sup>6</sup> I am not convinced that these claims exclude a case for the rule previously described.

Much private discrimination is invisible; one is not informed of invitations withheld. Most of the goods withheld are modest. I would be the last to question the value of a good party or a roll in the hay, but I think it also clear that they have lesser life consequences than university admissions, job offers, and mortgage availability. Discriminatory exclusion from long-term relationships, marriage included, is a special case about which I shall say more presently.

If a legal system were to attempt enforcement of a prohibition on private discrimination, it would need to craft a remedial system based on private suit, publicly administered investigations, or both. The potential number of claims is very large, and an accurate assessment of the relevant facts would be difficult. “Why didn’t you go out with Jim?” “Because he’s a dork.” “Isn’t it true that you did go out with Joe?” “Yes.” “Isn’t it true that Joe is *definitely* a dork, but a *white* dork?” “Joe is not a dork. He’s a dweeb. There’s a difference.”

Ironically, any enforcement mechanism invites discriminations along the lines of wealth and race. The better educated and more well-off will have the knowledge and resources to sue. Public investigations will not target upper class suspects. If we are to analogize private discrimination and private drug use, we ought to acknowledge that enforcement of the laws against the latter have not been enforced with an even hand.<sup>7</sup>

Consider lying, a practice that is always *prima facie* wrong, but unlawful only when intended to induce detrimental reliance or when honesty is required for testimony, a securities disclosure, tax return, and so on. No society makes lying as such a crime, and yet no society regards lying as a matter of moral indifference. *Some* lies are easy to prove, and *some*

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5. See Zwolinski, *supra* note 1, at 1047-48.

6. *Id.* at 1050-54.

7. See, e.g., MICHAEL TONRY, MALIGN NEGLECT, 109-11 (1995).

are quite harmful. On the whole, however, a general legal prohibition on lying would do more harm than good.

So I am not quite convinced by Professor Zwolinski's critique of the epistemic and consequentialist distinctions. It might be that, taken together, those considerations justify a categorical privilege for private discrimination, not because private discrimination is always unprovable or always of modest consequence, but because private discrimination is *usually* unprovable, *often* of modest consequence, and *generally* costly to remedy. The rule will certainly produce some wrong results, but it might well produce fewer of them at lower cost than an attempt to implement the standard. At the very least, reasonable persons might say that scarce resources for investigating wrong-doing might be better directed at graver evils such as sexual assault, domestic violence, child abuse, and so on.

Professor Zwolinski makes the important point that law has a symbolic or rhetorical function, a significant function and perhaps its primary one.<sup>8</sup> To limit the reach of a prohibition to the realm of symbols, however, the system would have to prohibit private suits and rely exclusively on public authority. Would a prohibition adopted with the explicit understanding that it exists just for show have the same symbolic power as other laws? The example of the sodomy laws is illustrative on this point. The sodomy laws inflicted considerable harm when used to support civil-side discrimination in employment and family law.<sup>9</sup> Whatever symbolic respect they ever had went out with their enforcement. The Georgia statute upheld in *Bowers v. Hardwick* facially applied to heterosexual oral sex.<sup>10</sup> This was rightly regarded as a joke, not a jeremiad.

Symbolic laws, moreover, remain on the books and will be exploited by the authorities when the occasion arises. Ban private discrimination as a symbolic matter, and just wait for a controversial judicial nomination. "Now, Judge Smithers, we understand that you're a brilliant jurist. I'm just a little troubled about the fact that you've never had a [insert racial, religious, or ethnic minority here] over for dinner. That's troubling enough, but as I'm sure you know, that's been *a crime* since the passage

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8. See Zwolinski, *supra* note 1, at 1048.

9. See, e.g., Christopher R. Leslie, *Creating Criminals: The Injuries Inflicted by "Unenforced" Sodomy Laws*, 35 HARV. C.R.-C.L. L. REV. 103, 136 (2000) ("[L]egislators, police officers, and judges all explicitly rely on the presumptive criminality of homosexual citizens to justify a wide range of official discrimination against gay men and lesbians.").

10. 478 U.S. 186, 188 n.1 (1986) ("A person commits the offense of sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another. . . .") (ellipsis in original) (quoting GA. CODE ANN. § 16-6-2 (1984)).

of the Zwolinski Act. . . .” Hypocrisy seems to be a permanent feature of the human condition, but the less of it we write into law, the better.

## II.

When *A* withholds friendship, respect, or love from *B*, is it *possible* to compel *A* to extend these goods? Some goods, to use Robert George’s term, are “reflexive”:

Moral goods are “reflexive” in that they are reasons to choose which include choice in their very meaning; one *cannot* participate in these goods otherwise than by acts of choice, that is, internal acts of will, and the internal disposition established by such choices. As internal acts, they are beyond legal compulsion.<sup>11</sup>

Friendship is surely such a good. We say of the undercover informant that he is a “false friend,” that is, no friend at all, even though the suspect may subjectively experience the feeling of friendship with the informant.

If friendship is such a good, so too is love. To say that *A* does not love *B* because of *B*’s race or religion supposes that interpersonal criteria, accessible to observers, determine whom *A* loves and does not love. If *B* meets these criteria but for *B*’s race, *A*’s failure to love *B* is discriminatory.

Suppose, fantastically, that this kind of calculation could be made reliably enough for purposes of litigation. Is it possible for *A* to love *B*, even if the cause of *A*’s inability is a predisposition *A* agrees is irrational? Saying “*A ought* to love *B*” is like saying “*A ought* to flap his arms and fly.”

The law should not command the impossible. If we wish to send social signals to reduce discrimination in love or marriage, we might consider subsidies like double exemptions on taxes for interracial, interethnic, or interfaith marriages. It makes more sense to reward love when it is lucky enough to be pro-social than to punish love when it is unlucky enough to mirror the society in which the lovers live.

## III.

John Stuart Mill thought that the arguments justifying strong individual rights of conscience and expression also justified a much broader range of behavioral autonomy.<sup>12</sup> On this point Mill has not yet prevailed.

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11. ROBERT P. GEORGE, MAKING MEN MORAL 43 (1993).

12. JOHN STUART MILL, *On Liberty*, in ON LIBERTY AND OTHER WRITINGS 5, 17

Freedom of conscience and expression had a preferred position even in Mill's time. Today sexual autonomy has joined them throughout the modern world in the ranks of what are thought to be fundamental human rights. *Lawrence v. Texas* is controversial only on the level of constitutional methodology;<sup>13</sup> even Justice Thomas, who dissented, said the Texas law was "silly" and that he would vote to repeal it.<sup>14</sup>

The Court, however, has refused to recognize a constitutional right to physician-assisted suicide,<sup>15</sup> or even a statutory right to use marijuana for medical purposes.<sup>16</sup> The Court is not alone in seeing faith, speech, and sex as special enclaves of personal autonomy. Indeed, in prevailing opinion and in U.S. law, speech, conscience, and sexuality hold their privileged status *even when they cause harm*,<sup>17</sup> because the rights to speak, to believe, and to love deliver benefits in general and in the long run that outweigh what harms may follow.

This hierarchy of preferred liberties closely tracks prevailing sentiments about the privilege of private discrimination. In what cases do we insist most earnestly on the right to discriminate? Nazis in Skokie; an all-male priesthood; and who goes to bed with whom.<sup>18</sup> If

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(Stefan Collini ed., 1989).

It will be convenient for the argument, if, instead of at once entering upon the general thesis, we confine ourselves in the first instance to a single branch of it, on which the principle here stated is, if not fully, yet to a certain point, recognised by the current opinions. This one branch is the Liberty of Thought: from which it is impossible to separate the cognate liberty of speaking and of writing. . . . [T]he grounds, both philosophical and practical, on which they rest, are perhaps not so familiar to the general mind, nor so thoroughly appreciated by many even of the leaders of opinion, as might have been expected. Those grounds, when rightly understood, are of much wider application than to only one division of the subject . . .

*Id.*

13. 539 U.S. 558 (2003); see, e.g., Andrew T. Hyman, *The Little Word "Due,"* 38 AKRON L. REV. 1, 49 (2005) ("The reasoning in *Lawrence* is very much of the same doctrinal variety as in *Dred Scott* and *Lochner*. even though—viewed as judicial legislation—the reasoning in *Lawrence* is far more reasonable and compassionate than that of either *Dred Scott* or *Lochner*." ) (footnote omitted).

14. 539 U.S. at 605 (Thomas, J., dissenting).

15. See *Washington v. Glucksberg*, 521 U.S. 702 (1997).

16. See *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483 (2001).

17. Cf. *Hudnut v. Am. Booksellers Ass'n*, 771 F.2d 323, 330 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986).

18. The ACLU initially lost a great deal of support for defending the right of the Nazis to march, but that stand has come to be seen as true to the organization's principles. See, e.g., PHILIPPA STRUM, *WHEN THE NAZIS CAME TO SKOKIE* (1999). A unanimous body of judicial opinion recognizes, on First Amendment grounds, an exemption to Title VII for employment decisions regarding clergy. See, e.g., Steven K. Green, *Religious Discrimination, Public Funding, and Constitutional Values*, 30 HASTINGS CONST. L.Q. 1, 23 (2002) ("[E]ven prior to the 1972 amendment, courts began to read a constitutionally compelled 'ministerial exception' into Title VII that allows religious institutions to discriminate on any basis—race, gender, national origin—for employment

the present consensus on the right to be let alone holds only across a limited range of the current hierarchy, *contra* Mill, we might also have a justification for an autonomy-based right of private discrimination. On the other hand, if Mill was right and the current hierarchy is arbitrary, I expect Professor Zwolinski is correct to say that the right to discriminate should, and eventually will, cover either far more, or far less, ground.

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decisions involving clergy.”) (footnote omitted) (italics omitted). As Cass Sunstein has pointed out, the Court’s holding in *Lawrence* was consistent with an overwhelming consensus in society at large. Gay marriage is politically controversial, but the proposition that sexual activity behind closed doors among consenting adults ought to be beyond the reach of the criminal law is politically uncontroversial. See Cass R. Sunstein, *What Did Lawrence Hold? Of Autonomy, Desuetude, Sexuality, and Marriage*, 55 SUP. CT. REV. 27 (2004). The overlap between the perceived scope of a right to discriminate, and the perceived scope of the right to freedom from coercive state regulation, seems very extensive if not, indeed, complete.

